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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIZABETH J. PUCKETT,

Defendant and Appellant.

D070928

(Super. Ct. No. SCS282517)

APPEAL from a judgment of the Superior Court of San Diego County, Edward P. Allard, III, Judge. Affirmed as modified; remanded with directions.

Cynthia M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr. and Susan Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Elizabeth J. Puckett of transportation of heroine for sale (Health & Saf. Code,¹ § 11352, subd. (a); count 1); possession of heroin for sale (§ 11351; count 2); and importing methamphetamine into the state (§ 11379, subd. (a); count 3).

The court deemed the sentence for count 1 to be the base term, with sentences for counts 2 and 3 to be served concurrently.² The court suspended imposition of the sentence and granted Puckett formal probation with terms and conditions. The court imposed a lab analysis fee under section 11372.5 in the amount of \$615, consisting of \$50 for each conviction, \$435 in penalty assessments, and \$30 for a state surcharge. The court also levied a drug program fee in the amount of \$205 under section 11372.7, comprised of a \$50 base fine, penalty assessments of \$145, and a \$10 state surcharge.

Puckett appeals, contending the court erred in failing to stay her sentence on counts 2 and 3 under Penal Code section 654. Puckett further argues that, because her sentences for counts 2 and 3 should have been stayed, the trial court also erred in ordering her to pay a \$50 lab analysis fee for those two counts. Also, Puckett maintains the penalty assessments imposed must be stricken because they are not authorized by statute.

¹ Statutory references are to the Health and Safety Code unless otherwise specified.

² At the sentencing hearing, the court stated, "it is the judgment of the court as to counts 1 and 2, the court's sentence on those counts to run concurrent with count 1 being the lead count." The parties agree that the court intended for the sentence of count 1 to be the base term and for counts 2 and 3 to be served concurrently. We agree.

We agree that Puckett's sentence under count 2 should have been stayed and the lab analysis fee for count 2 should have been stayed as well. We thus modify the judgment accordingly and instruct the superior court to amend the order granting probation consistent with this opinion. The judgment is affirmed in all other respects.

FACTUAL BACKGROUND

Prosecution

Puckett attempted to cross the border from Mexico into the United States at the San Ysidro pedestrian border crossing. A border patrol agent asked her if she was bringing anything from Mexico. Puckett responded in the negative. A canine officer approached Puckett, and the canine alerted to Puckett's groin area. A pat down search of Puckett disclosed a hard object in her groin area. As instructed by officers, Puckett took off her pants and removed a stuffed condom from her vagina. Inside the condom were plastic bags wrapped in black electrical tape. Three bags contained 75.5 grams of heroin. A fourth bag contained 4.3 grams of methamphetamine.

Defense

Puckett testified in her own defense. She testified that she traveled to Tijuana and was picked up by someone and taken to a house. She did not know any of the people she interacted with in Mexico. She was handed a black wrapped object but did not know its contents. She placed the black object into a condom and inserted it into herself. When she returned to the United States, someone was supposed to pick up the object from her, but she was arrested at the border.

Puckett testified that she was a film maker and her action was to prove "indifference to female genocide, a cultural cold war." She stated that she traveled down to Mexico as part of her research. She also stated that she heard voices telling her what to do and she sometimes had hallucinations. Puckett testified that she was not paid for crossing the border. However, she admitted that she knew what she was doing was illegal because it involved contraband.

DISCUSSION

I

PENAL CODE SECTION 654

"Penal Code section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct." (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) "Whether a course of criminal conduct is a divisible transaction which could be punished under more than one statute within the meaning of [Penal Code] section 654 depends on the intent and objective of the actor." (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

Here, Puckett contends the court erred in failing to stay her sentence under counts 2 and 3. The People counter that this issue is not yet ripe because the court "generally imposed a sentencing scheme but did not impose a specific prison term before it suspended imposition of [Puckett's] sentence on all counts and granted [her] probation." The People thus urge us to withhold considering this issue until/unless Puckett violates probation and then faces the type of double punishment Penal Code section 654 prohibits.

Yet, the People concede that duplicative prison sentences are not the only form of punishment prohibited by Penal Code section 654. For example, statutory fines constitute punishment within the meaning of Penal Code section 654. (See *People v. Hanson* (2000) 23 Cal.4th 355, 361-363; *People v. Tarris* (2009) 180 Cal.App.4th 612, 627-628 (*Tarris*).) Because the trial court imposed lab analysis fees on each count and Puckett claims that Penal Code section 654 prohibited such fees on counts 2 and 3, we find this issue of the application of Penal Code section 654 in the instant case ripe for our review.

"The trial court has broad latitude in determining whether [Penal Code] section 654, subdivision (a) applies in a given case." (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564.) The absence of an express finding from a trial court concerning the potential applicability of Penal Code section 654 does not mandate reversal on appeal. Rather, the court reviews the trial court's implicit determination that Penal Code section 654 does not apply, and determines whether there is substantial evidence to support the trial court's finding. (See *People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Andra* (2007) 156 Cal.App.4th 638, 640.)

Regardless of the evidence below, the parties agree that Penal Code section 654 applies to preclude separate punishments for the same act of transporting for sale a controlled substance and possessing it for sale. (See *People v. Tinker* (2013) 212 Cal.App.4th 1502, 1506 [holding Penal Code section 654 applies to convictions for possession of heroin and transportation of same heroin for sale].) As such, the trial court

erred in imposing separate sentences for Puckett's possession for sale and transportation for sale of heroin (counts 1 and 2) on the same occasion. Therefore, under Penal Code section 654, the sentence for count 2 and the corresponding lab analysis fee of \$50 must be stayed.

However, the parties disagree on the application of Penal Code section 654 to count 3, which concerned a different drug, methamphetamine. Generally, Penal Code section 654 " 'does not preclude multiple punishment for simultaneous possession of various narcotic drugs.' " (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 714 (*Monarrez*); see *People v. Menius* (1994) 25 Cal.App.4th 1290, 1296 ["[T]he possession of different drugs or controlled substances not only may violate different statutes, but may also be separately punished."].) Nevertheless, relying on *In re Adams* (1975) 14 Cal.3d 629 at page 635 (*Adams*), Puckett argues that a simultaneous transportation of a variety of illegal drugs can be done with a single intent and objective, requiring a stay under Penal Code section 654. Specifically, Puckett maintains there is a single intent and objective where a defendant is delivering all of the drugs to a single recipient. (*Ibid.*) Here, she claims she was acting as a "mule" who was contacted to smuggle drugs across the border. She accepted a single package from someone in Mexico to be delivered to one person in the United States.

Puckett's argument would be persuasive had the court stayed her sentence under count 3. But the court did not, and we must review the trial court's factual finding, whether implicit or explicit, in the light most favorable to the prevailing party, presuming

the existence of every fact the factfinder could reasonably deduce from the evidence. (See *Tarris, supra*, 180 Cal.App.4th at p. 627.) Thus, we are not concerned with what evidence supports Puckett's theory that the trial court should have stayed the sentence under count 3. Instead, we must determine if substantial evidence supports the court's implicit finding that Penal Code section 654 did not apply to count 3. Puckett does not address this issue whatsoever. For this reason alone, her argument fails.

Nonetheless, if we were to address this issue on the merits, we would find the court's factual finding supported by substantial evidence. Puckett was found in possession of 4.3 grams of methamphetamine (86 individual doses) and 75.5 grams of heroin (1,510 individual doses). At trial, the prosecution's expert testified that both drugs were possessed for sale. The expert also testified that Puckett had crossed the border 24 times in 2014, 12 times in 2015, and four times in 2016, before she was arrested in the instant matter. The expert opined that a person's multiple border crossings was an indication of the person's involvement in drug trafficking. The expert testified that he had seen drug smugglers who do not work with drug cartels, but instead, smuggle drugs from themselves and their friends or to sell to their community networks. Thus, because of the quantity and quality of drugs involved, it is reasonable for the trial court to find the drugs were not intended for any one person as opposed to a multitude of customers. (See *People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

Further, we are not persuaded by Puckett's reliance on *Adams, supra*, 14 Cal.3d 629. In that case, the defendant transported five different controlled substances that he

intended to deliver to one specific individual in a single transaction. (*Id.* at p. 632.) The California Supreme Court held that defendant could be punished only once for transporting the controlled substances because the simultaneous transportation of multiple substances was motivated by a single objective. (*Id.* at p. 635.) The court, however, distinguished the facts before it from cases involving possession of multiple substances and declined to disapprove cases holding that multiple punishments may be imposed for possession of multiple substances. (*Ibid.*)

Here, the only evidence that Puckett was going to give both the heroin and methamphetamine to a single person in the United States is her own, uncorroborated, testimony. Yet, as we discuss above, the evidence at trial did not establish that Puckett possessed the heroin and methamphetamine with the intent to supply it to one person in a single transaction. Based on the amount of drugs Puckett possessed, the fact that she had two different types of drugs, and her history of border crossings, the court easily could find she intended to make multiple sales of the narcotics she possessed. In other words, Puckett did not commit counts 1 and 3 as an indivisible course of conduct. As the court noted in *Monarrez*, "*Adams* simply does not deal with the case in which the defendant has been found to possess more than one particular illegal drug, or possess it with the intent to sell to a presumptively large number of buyers." (*Monarrez, supra*, 66 Cal.App.4th at p. 714.)

In summary, we are satisfied that substantial evidence supports the trial court's finding that Penal Code section 654 did not apply to count 3. "[D]ifferent drugs are

directed at different buyers--in some cases, at different classes of buyers--and represent different dangers to society. It would be absurd to hold that a criminal who deals in one contraband substance can expand the scope of his inventory without facing additional consequences." (*People v. Menius*, *supra*, 25 Cal.App.4th at p. 1297.) Accordingly, the court did not err in sentencing Puckett to a concurrent sentence under count 3 or levying a \$50 lab analysis fee under that count as well.

II

THE PENALTY ASSESSMENTS ADDED TO THE LAB ANALYSIS FEE AND DRUG PROGRAM FEE

Puckett next argues the trial court erred in adding penalty assessments to the lab analysis fee (§ 11372.5) and drug program fee (§ 11372.7). She contends the statutes do not authorize the addition of penalty assessments because penalty assessments may only be added to punitive fines and the lab analysis and drug program fees are not fines, but nonpunitive fees. We recently addressed this very issue in *People v. Alford* (2017) 12 Cal.App.5th 964 (*Alford*). In that case, we concluded that a criminal lab fee under section 11372.5 and a drug program fee under section 11372.7 are subject to penalty assessments. (*Alford*, *supra*, at pp. 967, 977.)

Puckett requests that we reconsider our determination in *Alford* in light of the legislative history of section 11372.5. There is nothing in the legislative history that leads us to believe we reached the incorrect conclusion in *Alford*. Thus, for the reasons

set forth in *Alford, supra*, 12 Cal.App.5th at pages 974 through 977, we conclude the trial court did not err in assessing penalties to the lab analysis fee and the drug program fee.

DISPOSITION

The judgment is affirmed as modified, and the matter is remanded with directions to the trial court to amend the order granting probation consistent with the views expressed in this opinion.

HUFFMAN, Acting P. J.

WE CONCUR:

IRION, J.

DATO, J.